

13-4608-cv

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

**FAIRFIELD COUNTY MEDICAL ASSOCIATION and,
HARTFORD COUNTY MEDICAL ASSOCIATION, INC.**
Plaintiffs-Appellees

v.

**UNITED HEALTHCARE OF NEW ENGLAND, INC., UNITED
HEALTHCARE INSURANCE COMPANY, INC., UNITED
HEALTHCARE SERVICES, INC., and UNITEDHEALTH GROUP, INC.**
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

**BRIEF OF AMICI STATE OF CONNECTICUT AND THE OFFICE
OF THE HEALTHCARE ADVOCATE IN SUPPORT OF
PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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IDENTITY AND INTEREST OF AMICI

Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, the State of Connecticut and the Connecticut Healthcare Advocate file this amicus brief in support of the position of the plaintiffs-appellees in this case. As a state, Connecticut is permitted to file this brief without the consent of the parties or leave of the Court. Fed. R. App. P. 29(a).

The State of Connecticut and the Office of the Healthcare Advocate (“OHA,” together with the State of Connecticut, the “State Amici”) have a significant interest in the outcome of this case. Defendants-Appellants (“United”)¹ have summarily terminated thousands of Connecticut physicians from participation in United’s Connecticut Medicare Advantage Plan (“MAP”) without issuing the termination notices required by law, and without taking adequate measures to ensure patients who lose access to their doctors will be able to find appropriate new physicians to care for them. The State Amici seek to protect these vulnerable citizens from further injury. In

¹ We refer to the United Defendants-Appellants -- United Healthcare of New England, Inc., United Healthcare Insurance Company, Inc., United HealthcareServices, Inc., and UnitedHealth Group -- as “United.”

addition, the potentially poor health outcomes that may result from the terminations have significant ramifications for the State of Connecticut and its taxpayers. Among other things, Connecticut has an interest in preventing the potentially significant costs associated with bad health outcomes that may result from the terminations.

The State Amici are represented by the Connecticut Attorney General. The Attorney General and his staff have been assisting United Medicare Advantage enrollees since United's physician termination initiative began in early October, 2013. The Office of the Attorney General has received phone calls, emails, and letters about this problem from beneficiaries and physicians on almost a daily basis. The Attorney General and his staff also have exchanged letters with United and with the U.S. Centers for Medicare and Medicaid Services ("CMS") in an effort to learn the details of United's termination program, and to persuade United to take appropriate steps to protect the elderly and disabled enrollees affected. *See* Joint Appendix ("JA") at 177-183, 185-186; *see also* Exhibits A, D and E to Second Circuit *Brief Amici Curiae of Amici Associations in Support of Plaintiffs-Appellees and in Support of Affirmance of the District Court's Preliminary*

Injunction (hereinafter, the “Amici Assoc. Brief”) (Dec. 23, 2013, Doc. No. 102).

OHA is an agency of the State of Connecticut. OHA has broad authority to advocate systemically on behalf of healthcare consumers. See Conn. Gen. Stat. §§ 38a-1040, *et seq.* OHA educates and assists thousands of consumers a year with health insurance issues, including direct appeals and grievances. In addition, OHA provides assistance to consumers enrolled in Medicare Advantage plans. Beginning in October 2013, OHA began receiving questions and complaints from members and providers about United’s termination of Medicare Advantage network providers, and to date has addressed more than 60 such complaints.

ARGUMENT

I. THE PRELIMINARY INJUNCTION FURTHERS THE PUBLIC INTEREST AND IS NECESSARY TO PREVENT IRREPARABLE HARM.

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public

interest.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008); *see also*, *New York Progress and Protection PAC v. Walsh*, 733 F.3d 483, 486 (2d Cir. 2013). In this case, the District Court correctly held that in the absence of injunctive relief, United would cause irreparable harm to the physician-patient relationship between the plaintiff medical society members and thousands of Connecticut residents. It also correctly held that the preliminary injunction furthers important public interests, including continuity of patient care.

As the District Court rightly noted in its December 5, 2013 *Ruling and Order Granting Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction* (the “Order”), “several district and circuit courts have found that disruption of the physician-patient relationship can cause irreparable harm that justifies issuing preliminary injunctive relief, particularly when the patient belongs to a vulnerable class or may have a deep trust relationship with the physician because of the serious nature of the patients’ illness or medical needs.” *See* Order at 12-13 (Docket No. 48) (citing *Schisler v. Heckler*, 574 F. Supp. 1538, 1552-53 (W.D.N.Y. 1983); *Roudachevski v. All-Amer. Care Ctrs, Inc.*, 648 F.3d 701, 706-07 (8th Cir. 2011)). “Other

district courts have also found that dropping certain physicians from insurance plans, or altering elderly patients' access to specialists by terminating provider plans with those physicians, may cause irreparable harm and offend the public interest." *Id.* at 13 (citing *Barron v. Vision Serv. Plan*, 575 F. Supp. 2d 825, 835-36 (N.D. Ohio 2008)).

In addition, in its December 8, 2013 decision denying United's Motion to Stay Injunction, the District Court held that the public interest was furthered by granting the preliminary injunction. Specifically, it held that "[t]he public interest favors enforcement of contracts, continuity of patient care (especially care of elderly patients), and the arbitration of disputes subject to arbitration clauses." *See Ruling on Motion for Stay* at 6 (Dec. 8, 2013, Docket no. 55).

The record below and the experiences of the State Amici support the District Court's conclusions. The sheer size and scope of the physician terminations are, in the State Amici's experience, unprecedented in Connecticut. Though United has refused to disclose to Connecticut the exact number of physicians terminated or the number of enrollees affected, the District Court found that United has

unilaterally, and without proper cause, terminated more than 2,000 physicians from its MAP. *See Order* at 2-3. The number of Connecticut patients directly affected by these terminations by virtue of an existing relationship with a terminated physician is estimated at or near 10,000.

To make matters worse, United initiated the terminations during the open enrollment period while tens of thousands of elderly Connecticut citizens were deciding whether to join or remain in United's MAP. Though United eventually provided notice to some patients that their physicians would be terminated, it did not mail those notices to the affected patients until November 15, 2013. As a result, patients did not receive notices until there were less than three weeks remaining in the open enrollment period, which ended on December 7, 2013. *See JA* at 78-92.

Not surprisingly, the terminations have caused wide-spread confusion and uncertainty among Connecticut's physicians and their patients. The State Amici have received numerous complaints about the confusing nature of the termination notices and the conflicting information United has provided to the public and physicians about whether particular physicians remain in United's MAP.

In some instances, United listed terminated physicians in their 2014 enrollment materials and assured patients that the terminated physicians remained in United's network. In others, United told physicians they had been terminated, but subsequently reinstated the physicians without telling them it had done so.

Such confusing and conflicting information has made it extremely difficult for physicians to provide accurate information and continuous medical care to their patients. It also made it difficult for many sick and elderly Connecticut citizens to make informed decisions about whether to remain in United's MAP. Thus, the unlawful and disorderly terminations have threatened wholesale disruption to continuity of care for thousands of Connecticut's most vulnerable citizens. As set forth in physician declarations submitted below, disruption to continuity of care is highly detrimental, especially for the elderly and those suffering from chronic and debilitating conditions. *See* JA 205-207, 222-224, 243-244, 255-257. Proper treatment of these patients frequently requires knowledge of a patient's medical history, symptoms and prior treatments – things many elderly patients, in particular, may have difficulty recalling on their own.

In addition to the confusing manner in which United rolled out its massive and unlawful network reduction, the State Amici remain concerned that the remaining network is insufficient to meet the needs of all of United's MAP enrollees. The patient notices United mailed on November 15, 2013, set out the names and addresses of alternative in-network doctors, together with a statement that if the patients thought such alternative physicians were a good choice, they need not do anything further. In other words, patients were implicitly assured that the identified substitute doctors were suited to their needs and capable of caring for them. Given the unprecedented number of terminations and affected patients, however, it is, in the State Amici's experience, highly unlikely that United has verified that all of these new physicians are willing and able to care for their existing patients *and* untold numbers of future patients who may have enrolled or re-enrolled in United's MAP.

The State Amici have received reports, for instance, that a physician practice group responsible for all kidney and renal care in a region consisting of over 200,000 residents has been terminated by United. Based on these and other reports we have received, there

remain significant questions about whether the remaining in-network doctors have the capacity to accept new patients, whether their specialties are equivalent to those of the terminated physicians, and whether the remaining doctors with comparable expertise are within a reasonable traveling distance for all of United's enrollees. Physicians rightly worry that if patients are unable to access particular treatments, they may suffer from longer recoveries and higher risks of infections and other complications.

Though CMS apparently believes United's reduced network is adequate, CMS has refused to disclose even the most basic information about the remaining network, including the number of physicians terminated. *See* Exhibit D to Amici Assoc. Brief (Doc. 102). Nor has CMS done anything to independently verify whether existing patients are, in fact, being offered suitable alternatives. On the contrary, and somewhat remarkably, CMS reports that in assessing United's remaining network it did not consider the special needs of the disabled, elderly, low income, those without personal transportation, and non-English speaking patients. *Id.* In other words, CMS concedes that United's reduced network fails to meet the needs of Connecticut's most

vulnerable patients. CMS's conclusions about United's network adequacy, therefore, have no bearing on the irreparable harm identified by the trial court – that is, to the risk that elderly patients may suffer disruptions in the continuity of their care or their doctor-patient relationships.

Based on the State Amici's experiences and the evidence in the record, it is clear the preliminary injunction is necessary to prevent the irreparable harm United's terminations would otherwise cause through the disruption of the patient-physician relationship. There also is a broader public policy interest in protecting the health and well-being of Connecticut citizens. Bad health outcomes have significant ramifications for society at large, including state governments. In addition to the costs borne by state governments as a result of bad health outcomes, valuable resources within OHA and the Office of the Attorney General continue to be devoted to those affected by these unlawful terminations instead of other citizens who require assistance navigating our increasingly complex healthcare delivery and payment systems. For all of these reasons, and the other reasons noted in the

District Court's decision, the preliminary injunction furthers the public interest and prevents irreparable harm.

CONCLUSION

The District Court's order granting a preliminary injunction should be affirmed.

Respectfully submitted,

THE STATE OF
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CERTIFICATION OF COMPLIANCE WITH RULE 32(A)(7)

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure in that this brief contains 1872 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a monospaced typeface (Century Schoolbook) with 10.5 or fewer characters per inch.

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CERTIFICATION OF SERVICE

I hereby certify that true and accurate copies of the foregoing brief were served by first class mail, postage prepaid, by Brescia's Printing Service in accordance with Rule 25 of the Federal Rules of Appellate Procedure on this 30th day of December, 2013, to the Clerk of this Court and the following counsel of record:

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